Attachment B

Clause 4.6 Variation Request – Height of Buildings

Clause 4.6 variation request - Height of buildings (clause 4.3 SLEP 2012)

1.0 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe)* at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney [2019]* NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 Sydney Local Environmental Plan 2012 ("SLEP")

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of Sydney Local Environmental Plan 2012 (SLEP) the height of a building on the subject land is not to exceed 9 metres in height. The objectives of this control are as follows:

(a) to ensure the height of development is appropriate to the condition of the site and its context,

(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,

(c) to promote the sharing of views,

(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,

(e) in respect of Green Square -

(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and

(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.

Building height is defined as follows:

> ***building height*** *(or* ***height of building****) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like*

Ground level existing is defined as follows:

> ***ground level (existing)*** means the existing level of a site at any point.

It has been determined that the Harris Street building façade has a proposed building height of between 10.8 and 11.59 metres representing a variation of between 1.8 metres (20%) and 2.59 metres (28.7%).

The Little Mount Street facing building façade has a variable height of between 9.806 and 10.31 metres representing a variation of between 1.31 metres (14.5%) and 805mm (8.9%). The Little Mount Street upper-level building façade breaches the building height standard by between 2.795 metres (31%) and 3.350 metres (37.2%).

The clerestory window elements exceed the building height standard by between 3.17 metres (35.2%) and 3.395 metres (37.7%) with the existing lift overrun exceeding the height standard by 3.985 metres (44.2%) as depicted in the following plan extracts.

Figure 1 – Building height breaching elements as viewed from Harris Street.

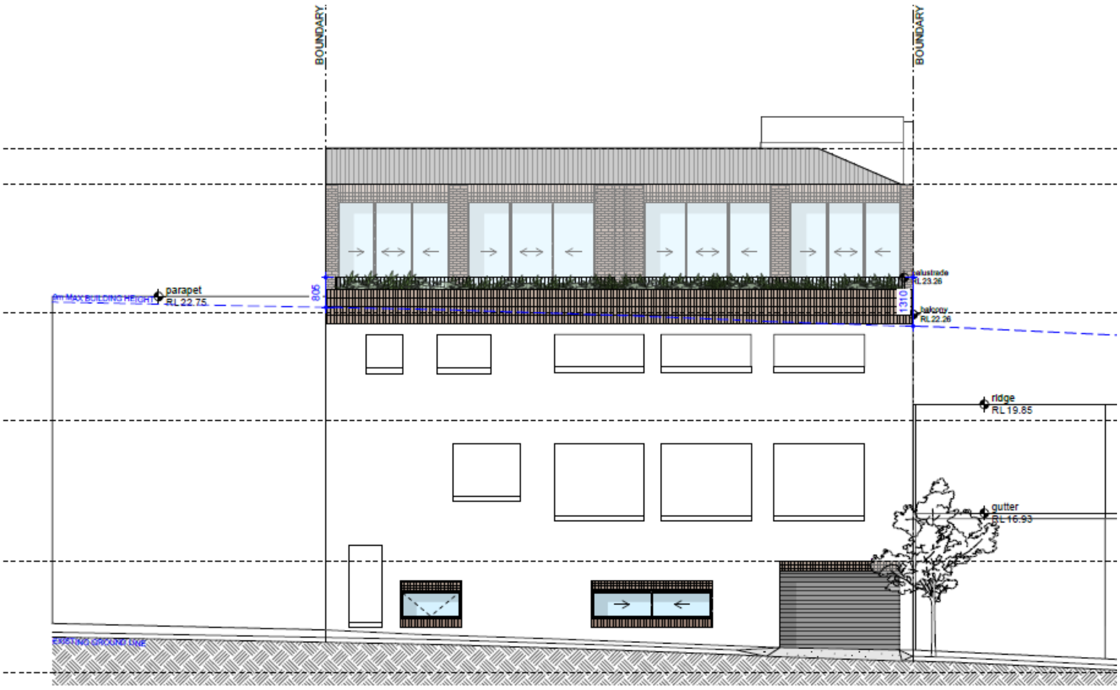

Figure 2 – Building height breaching elements as viewed from Little Mount Street.

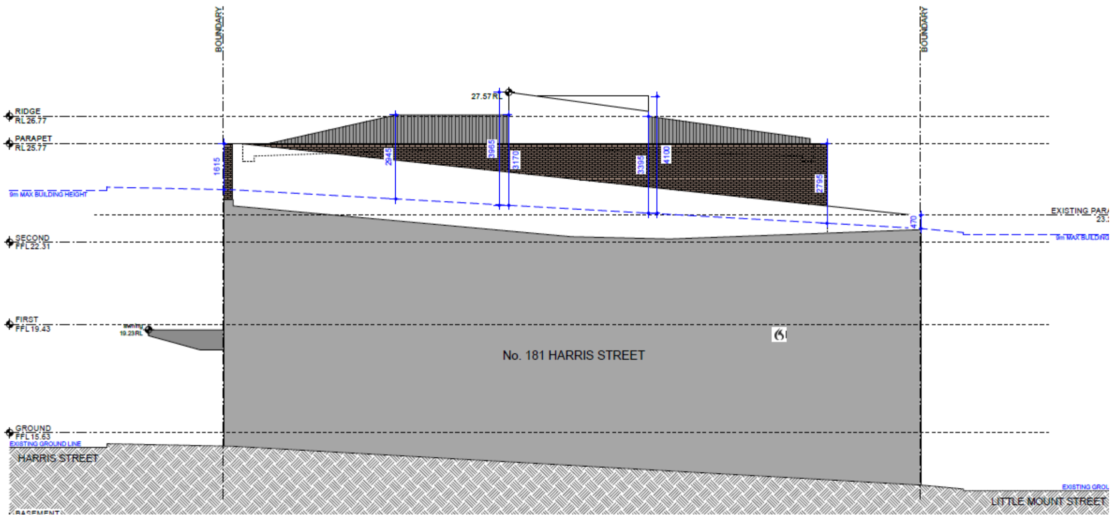

Figure 3 – Building height breaching elements as viewed from north-west.

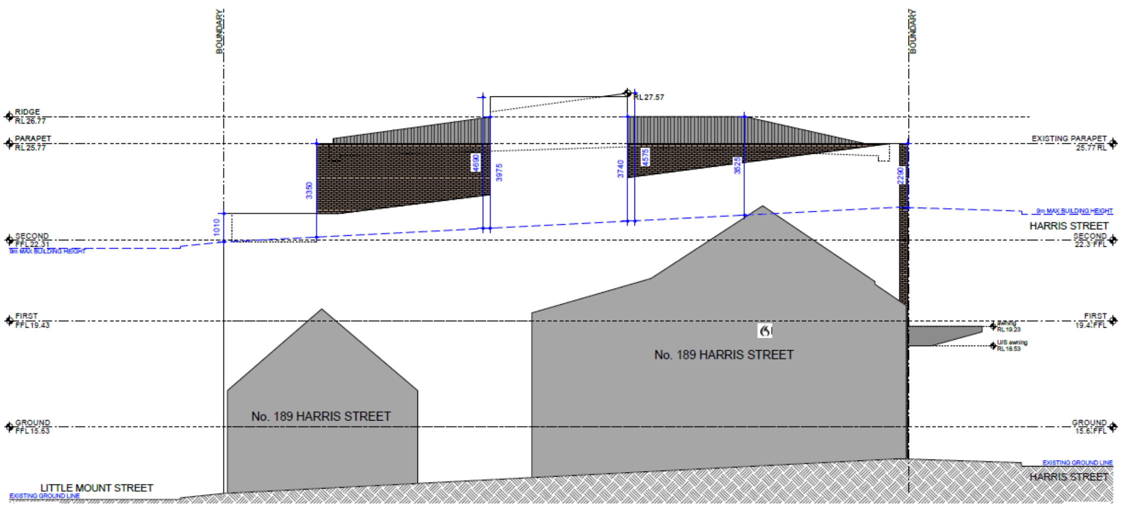

Figure 4 – Building height breaching elements as viewed from south-east.

I note that the building height as it presents to Harris Street is only slightly increased beyond that which currently exists on the site with the increase in building height facilitating the adaptive reuse of the existing building for shop top housing.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of SLEP provides:

(1) The objectives of this clause are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The decision of Chief Justice Preston in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal *in RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

> *"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development".*

If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of SLEP provides:

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

This clause applies to the clause 4.3 Height of Buildings Development Standard.

Clause 4.6(3) of SLEP provides:

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

The proposed development does not comply with the height of buildings provision at 4.3 of SLEP which specifies a maximum building height however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*

19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*

20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*

21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48].*

    However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3 of SLEP a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

    (a) compliance is unreasonable or unnecessary; and

    (b) there are sufficient environmental planning grounds to justify contravening the development standard

4.0 Request for variation

4.1 Is clause 4.3 of SLEP a development standard?

The definition of "development standard" at clause 1.4 of the EP&A Act includes:

> *(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 4.3 SLEP prescribes a height provision that relates to certain development. Accordingly, clause 4.3 SLEP is a development standard.

4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in Wehbe v Pittwater Council [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

<u>Consistency with objectives of the height of buildings standard</u>

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

> *(a) to ensure the height of development is appropriate to the condition of the site and its context,*

Response: The proposed building height, in particular the building height standard breaching elements are consistent with those established by the existing building and appropriate in the context that the proposal seeks the legitimate adaptive reuse of the existing building. The floor space has been appropriately distributed across the site having regard to the condition of the site and its context

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 I have formed the considered opinion that most observers would not find the proposed development by virtue of its building height offensive, jarring or unsympathetic in a streetscape context having regard to the built form characteristics of development within the site's visual catchment.

The proposal achieves this objective notwithstanding the building height breaching elements.

> *(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,*

Response: After examining the heritage impact of the development on the cultural heritage of the conservation area I am satisfied that:

- The proposed works will have an acceptable impact on the way in which the subject site present to Harris Street and Little Mount Street and will have a neutral impact on the HCA and surrounding heritage items.

- The proposal will have no impact on the adjoining heritage item (191 Harris Street) because appropriate setbacks are maintained and because the existing primary view corridors to, and from, the item will not be impacted.
- The proposal will have no impact on the heritage items in the vicinity because the existing primary view corridors to, and from, the item will not be impacted.

The proposed building heights, in particular the elements located above the height standard, ensure an appropriate height transitions between new development and heritage items and buildings in heritage conservation areas.

This objective is achieved notwithstanding the building height breaching elements.

(c) to promote the sharing of views,

Response: Having walked the surrounding streets to identify potential public and private view corridors, I have formed the considered opinion that the building height breaching elements will not give rise to any adverse public or private view impacts.

This objective is achieved notwithstanding the building height breaching elements.

(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,

Response: Not applicable.

(e) in respect of Green Square –

(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and

(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.

Response: Not applicable.

Having regard to the above, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard. Given the developments consistency with the objectives of the height of buildings standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

4.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

24. *The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient environmental planning grounds

The aspect or element of the development that contravenes the height of building standard is the portion of the building located above the 9m height of buildings standard as shown in Figures 1 - 4. These images also demonstrate that the existing building exceeds the 9m height of building standard with strict compliance requiring the demolition of the upper portion of the existing building or the complete demolition of the existing building and rebuild a building which is significantly lower than the existing building.

Sufficient environmental planning grounds exist to justify the variation to the height of buildings standard. Those grounds are as follows:

<u>Ground 1</u>

Objective 1.3(b) of the Environmental Planning and Assessment Act 1979 is:

> *"to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,"*

Consistent with objective 1.3(b) of the EP&A Act, SLEP includes the following aim at clause 1.2(2)(c):

> *(c) to promote ecologically sustainable development,*

The retention, expansion and adaptive reuse of the non-complying element of the building facilitates ecologically sustainable development. It reuses the structure of an existing building and avoids the environmental impacts of demolition and unnecessary waste. It reduces resource consumption and reduces waste materials. It also maintains the economic viability of the development whilst management impacts on the environment. The proposed development achieves objective 1.3(b) of the EP&A Act and the relevant aims in clause 1.2(2) of SLEP.

A development that demolished and did not replace the non-complying element of the development would be inconsistent with (and would tend to hinder the achievement of) Objective 1.3(b) of the EP&A Act and clause 1.2(2)(c) of SLEP.

Ground 2

Objective 1.3(c) of the EP& Act is:

> *"to promote the orderly and economic use and development of land,"*

Compliance with the development standard would require demolition of the upper portion of the existing building and associated floor space. The cost of demolishing the building to be left with less usable gross floor area than that which currently exists is uneconomic and is also disorderly.

The proposal seeks to adaptively reused the existing building and to augment floor space through the provision of an additional level of accommodation which will increase the stock of housing within the City of Sydney Local Government Area and thereby provide an important social benefit. Approval of the building height variation will facilitate the adaptive reuse of the existing building for a mixed-use outcome and in doing so promote the orderly and economic use and development of land consistent with this objective.

Ground 3

Objective 1.3(g) of the EP&A Act is:

> *"to promote good design and amenity of the built environment,"*

The proposed development generally maintains the height of the building but significantly enhances the design and appearance of the building. The retention of the non-complying element of the building through its enhanced design and visual appearance is consistent with objective 1.3(b) of the EP&A Act as it results in a building that promotes good design and amenity of the built environment.

Ground 4

The proposed adaptive re-use of the existing building which proposes element above the height limit does not result in any additional environmental impacts beyond what exists but results in an improvement in the design and visual appearance of the building.

For the above reasons there are sufficient environmental planning grounds to justify contravening the development standard.

It is noted that in *Initial Action,* the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

There are sufficient environmental planning grounds to justify contravening the development standard.

5.0 Conclusion

T consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

(a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

(b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

Boston Blyth Fleming Pty Limited

Greg Boston

B Urb & Reg Plan (UNE) MPIA

Director

25.6.25